Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals in *Holder* v. *Gutierrez*, No. 10-1542 (*Gutierrez* Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (*Gutierrez* Pet. App. 5a-6a, 12a-16a) and the immigration judge (*Gutierrez* Pet. App. 7a-9a, 17a-27a) are unreported.

The opinion of the court of appeals in *Holder* v. *Sawyers*, No. 10-1543 (*Sawyers* Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (*Sawyers* Pet. App. 5a-8a) and the immigration judge (*Sawyers* Pet. App. 9a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals in *Gutierrez* was entered on January 24, 2011. On April 18, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari in *Gutierrez* to May 24, 2011. On May 17, 2011, Justice Kennedy further extended the time to June 23, 2011, and the petition was filed on that date. The petition for a writ of certiorari in *Gutierrez* was granted on September 27, 2011, and the case was consolidated with *Sawyers* for oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Sawyers* was entered on October 14, 2010. A petition for rehearing was denied on February 1, 2011 (*Sawyers* Pet. App. 3a). On April 20, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari in *Sawyers* to June 1, 2011. On May 25, 2011, Justice Kennedy further extended the time to June 23, 2011, and the petition was filed on that date. The petition for a writ of certiorari in *Sawyers* was granted on September 27, 2011, and the case was consolidated with *Gutierrez* for oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident (LPR) alien as follows:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a).

The INA defines the phrase "lawfully admitted for permanent residence," as used in Subsection (a)(1), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The INA defines "residence," the noun form of the term "resided" used in Subsection (a)(2), as the alien's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). And the INA defines "admitted," also used in Subsection (a)(2), as "the lawful

entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). An alien may be "admitted" to the United States either at a port of entry or by adjusting his status to that of an LPR while already in the country. See *In re Alyazji*, 25 I. & N. Dec. 397, 399-400 (B.I.A. 2011); *In re Rosas-Ramirez*, 22 I. & N. Dec. 616, 619 (B.I.A. 1999).

The cancellation-of-removal statute further provides that an alien's period of continuous residence is deemed to end

> when the alien is served a notice to appear under section 1229(a) of this title, or * * * when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1).

To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998). The alien bears the burden of proof on those issues. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d). The ultimate discretion of the Attorney General to grant such relief is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted).

2. a. In 1989, at the age of five, respondent Gutierrez, a native and citizen of Mexico, illegally entered the

United States and thereafter resided in the United States with his parents. *Gutierrez* Pet. App. 12a, 18a; *Gutierrez* J.A. 33, 47-48. In 1991, when Gutierrez was seven years old, his father obtained LPR status. *Gutierrez* Pet. App. 12a, 18a; *Gutierrez* J.A. 25, 58. In October 2003, at the age of 19, Gutierrez obtained LPR status. *Gutierrez* Pet. App. 12a-13a; *Gutierrez* J.A. 19, 47.

In December 2005, immigration officials apprehended Gutierrez at the border for alien smuggling and subsequently served and filed a Notice to Appear charging him with being inadmissible on that basis under 8 U.S.C. 1182(a)(6)(E)(i). *Gutierrez* Pet. App. 18a; *Gutierrez* J.A. 59-61. Gutierrez admitted to the facts establishing his removability but sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). *Gutierrez* Pet. App. 13a, 19a; *Gutierrez* J.A. 24-25, 47-56.

In March 2006, after a hearing, an immigration judge (IJ) found Gutierrez statutorily eligible for cancellation of removal, even though he had neither been lawfully admitted for permanent residence for five years (8 U.S.C. 1229b(a)(1)) nor resided in the United States for seven years after a lawful admission (8 U.S.C. 1229b(a)(2)). *Gutierrez* Pet. App. 19a-22a. The IJ first applied *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), to permit Gutierrez to rely on his father's years of lawful residence after his father's admission (attaining LPR status) in 1991 to satisfy Section 1229b(a)(2)'s seven-year continuous-residence requirement. *Gutierrez* Pet. App. 20a-22a. In *Cuevas-Gaspar*, the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for

the purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement. 430 F.3d at 1021-1029.

The IJ next invoked the reasoning of *Cuevas-Gaspar* to permit imputation to Gutierrez of his father's 1991 adjustment to LPR status as well. *Gutierrez* Pet. App. 20a-22a. By virtue of that additional imputation, the IJ found that Gutierrez satisfied Section 1229b(a)(1)'s separate requirement that the alien have been an LPR for at least five years. *Id.* at 22a.[1]

Finally, after weighing Gutierrez's equities, the IJ granted him cancellation of removal in the exercise of discretion. *Gutierrez* Pet. App. 22a-26a.

b. The Board of Immigration Appeals (Board) reversed the IJ's decision and remanded for entry of an order of removal. *Gutierrez* Pet. App. 12a-16a.

The Board declined to extend *Cuevas-Gaspar* to permit the use of imputation to satisfy Section 1229b(a)(1)'s requirement that the alien have been lawfully admitted as a permanent resident for five years. *Gutierrez* Pet. App. 13a-14a. The Board distinguished Section 1229b(a) from the statute at issue in *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (9th Cir. 1994), the case that formed the basis for the Ninth Circuit's holding in *Cuevas-Gaspar*. *Gutierrez* Pet. App. 14a-15a. In *Lepe-Guitron*, the Ninth Circuit had considered the term "domicile" as an eligibility requirement under former 8 U.S.C. 1182(c) (1988) (commonly known by its location in the INA as Section 212(c)).[2] In that case, the Ninth Circuit had held

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[1] It was undisputed that Gutierrez had not been convicted of any aggravated felony, so the IJ also found that he satisfied 8 U.S.C. 1229b(a)(3). *Gutierrez* Pet. App. 20a.

[2] Section 212(c), which was repealed in 1996 and replaced by Section 1229b(a) (see Illegal Immigration Reform and Immigrant Responsi-

that a minor child's "domicile" is that of his parents because domicile requires an intent to remain indefinitely and children are not legally capable of forming the necessary intent. 16 F.3d at 1025. The Board explained in this case that the Ninth Circuit's reasoning in *Lepe-Guitron* does not apply to Section 1229b(a)(1)'s five-year LPR status requirement because the period of five years is measured from when the alien was "admitted" as an LPR, and that "admitted" is a term of art under the INA that "does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." *Gutierrez* Pet. App. 14a. Accordingly, the Board reasoned that, unlike in *Lepe-Guitron*, "it was unnecessary to look to the respondent's parent to determine intent" when evaluating whether he had accrued five years of LPR status. *Id.* at 15a. "Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant." *Ibid.*

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bility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597), provided at the time of *Lepe-Guitron* that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1988). The Board and courts have interpreted that provision to allow for a discretionary waiver for inadmissible or deportable aliens who were permanent residents and who had accrued seven years of "lawful unrelinquished domicile" in the United States. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1023; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (explaining that Section 212(c) was extended to deportable aliens).

Even as to Section 1229b(a)(2), the requirement directly at issue in *Cuevas-Gaspar*, the Board noted that that provision also "contains no domicile requirement," but rather "requires residence, which contains no element of subjective intent." *Gutierrez* Pet. App. 14a-15a. The Board further concluded that to allow imputation of a parent's status and residence to meet both the first and second prongs of Section 1229b(a) "would essentially destroy the distinct tests mandated by Congress." *Id.* at 15a.

c. On remand, the IJ entered a removal order. *Gutierrez* Pet. App. 7a-9a. Gutierrez appealed, and the Board reaffirmed its prior disposition. *Id.* at 5a-6a. The Board cited its then-recent precedential decision in *In re Escobar*, 24 I. & N. Dec. 231 (2007), in which the Board noted its disagreement with *Cuevas-Gaspar* and elaborated on its reasoning for not extending *Cuevas-Gaspar*'s imputation rationale to Section 1229b(a)(1)'s five-year LPR status requirement. *Gutierrez* Pet. App. 5a-6a.

Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board rejected an alien's invocation of imputation in attempting to satisfy Section 1229b(a)(2)'s seven-year continuous-residence requirement. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decisions in *Ramirez-Vargas* and *Escobar* pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See 24 I. & N. Dec. at 600-601.

d. The Ninth Circuit granted Gutierrez's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the

Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). *Gutierrez* Pet. App. 2a. In *Mercado-Zazueta*, the Ninth Circuit rejected the Board's decisions in *Ramirez-Vargas* and *Escobar* and treated *Cuevas-Gaspar*'s holding as binding with respect to the seven-year continuous-residence requirement in Section 1229b(a)(2). See 580 F.3d at 1115. The Ninth Circuit also extended *Cuevas-Gaspar* to Section 1229b(a)(1), holding that "for purposes of satisfying the five years of lawful permanent residence required under [Section 1229b(a)(1)], a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Id.* at 1113.

3. a. In October 1995, at the age of 15, respondent Sawyers, a native and citizen of Jamaica, was admitted to the United States as an LPR. *Sawyers* J.A. 48, 58; *Sawyers* Pet. App. 10a. According to Sawyers, his mother already had been living in the United States as an LPR at the time. *Id.* at 6a. The record does not indicate whether Sawyers had been present in the United States prior to his admission as an LPR in 1995.

On August 9, 2002, Sawyers was convicted of maintaining a dwelling for keeping a controlled substance, in violation of Delaware law. *Sawyers* J.A. 30-44; *Sawyers* Pet. App. 11a. On December 14, 2005, he was convicted of criminal possession of a controlled substance (cocaine), in violation of New York law. *Id.* at10a.

The Department of Homeland Security (DHS) subsequently commenced removal proceedings against Sawyers by filing a Notice to Appear charging (as amended) that he is subject to removal from the United States under 8 U.S.C. 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. *Sawyers* Pet. App. 10a-11a. Before the IJ, Sawyers denied the charge of

removability and, in the alternative, sought relief in the form of cancellation of removal pursuant to 8 U.S.C. 1229b(a). *Id.* at 11a-13a; *Sawyers* J.A. 16-22, 49-55.

In September 2007, after a hearing, the IJ found Sawyers removable as charged and further held that he was ineligible for cancellation of removal. *Sawyers* Pet. App. 9a-14a. As to the latter question, the IJ determined that Sawyers's August 2002 conviction would have made him removable at that time and therefore cut off his period of residence in the United States before he had accrued the seven years of continuous residence required by Section 1229b(a)(2). *Id.* at 13a.[3]

b. The Board agreed that Sawyers was ineligible for cancellation of removal and dismissed his appeal. *Sawyers* Pet. App. 5a-8a. As an initial matter, the Board agreed with the IJ that Sawyers's August 2002 conviction demonstrated his commission of a removable offense (thereby cutting off his own period of continuous residence short of the requisite seven years). *Id.* at 6a.

The Board then noted that the IJ did not address Sawyers's argument that his mother's period of lawful residence should be attributed to him for purposes of meeting Section 1229b(a)(2)'s seven-year continuous-residence requirement. The Board, however, ultimately deemed that omission harmless. *Sawyers* Pet. App. 6a-

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[3] At the time of the hearing, Sawyers had been "an alien lawfully admitted for permanent residence" for more than five years and hence satisfied 8 U.S.C. 1229b(a)(1). See 8 C.F.R. 1.1(p); *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006). In addition, although DHS originally charged Sawyers with being subject to removal for having been convicted of a drug-trafficking aggravated felony, it later withdrew that charge, and the IJ made no determination as to whether any of Sawyers's convictions were aggravated felony offenses. *Sawyers* Pet. App. 10a-11a. Accordingly, the government does not dispute that Sawyers also satisfied 8 U.S.C. 1229b(a)(3) for present purposes.

7a. The Board acknowledged the holding in *Cuevas-Gaspar*, *supra*, that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the purpose of satisfying the seven-year residency requirement in Section 1229b(a)(2). *Sawyers* Pet. App. 6a-7a. But the Board considered itself bound by its more recent decision, *In re Escobar*, *supra*, in which the Board had explained its disagreement with *Cuevas-Gaspar* in declining to extend the imputation rule to Section 1229b(a)(1)'s five-year LPR status requirement. *Sawyers* Pet. App. 7a. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decision in *Escobar* pursuant to *Brand X Internet Services*, *supra*. *Sawyers* Pet. App. 7a.

c. The Ninth Circuit granted Sawyers's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, *supra*, "on an open record for any further determinations that the [Board] deems necessary," including findings "regarding the residency of [Sawyers's] mother and regarding whether [Sawyers] was a minor residing with her." *Sawyers* Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

The Ninth Circuit's rule permitting an alien seeking cancellation of removal to rely on a parent's period of lawful permanent resident status and residence after lawful admission to satisfy the eligibility requirements of 8 U.S.C. 1229b(a)(1) and (2) is contrary to the statute's plain language, its legislative history, and the

Board's authoritative interpretation—all of which require that "the alien" personally satisfy the statute's requirements.

A. The plain language of Section 1229b(a) dictates that the decisionmaker look only to the alien seeking relief, not anyone else, to determine whether "*the* alien" "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) has resided in the United States continuously for 7 years after having been admitted in any status." The phrase "after having been admitted," and the definition of "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer" (8 U.S.C. 1101(a)(13)(A)), specify the alien's own admission rather than the admission of any other individual. The INA's definition of "residence" as a person's "principal, actual dwelling place in fact, without regard to intent" (8 U.S.C. 1101(a)(33)), denotes the alien's own residence and renders parental intent irrelevant with respect to Section 1229b(a)(2)'s continuous-residence requirement. And the phrase "lawfully admitted for permanent residence," defined to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States" (8 U.S.C. 1101(a)(20)), refers to a status personal to the individual alien.

In light of the clear textual mandates of Sections 1229b(a)(1) and (2), the lack of an express bar on imputation is not tantamount to affirmatively authorizing imputation, nor does it leave the issue open to that interpretation. Allowing imputation would also undermine the operation of related INA provisions in a way that Congress could not have intended.

B. Consistent with the statute's plain language, nothing in the legislative history indicates that Congress

intended that an alien be allowed to rely upon another person's status, residency, or admission date to satisfy the requirements of Section 1229b(a). In particular, the suggestion that Congress ratified the Board's interpretation permitting imputation under former Section 212(c) rings hollow given that Section 212(c) turned on the alien's "domicile," whereas Section 1229b(a)(2) turns on the alien's "residence." By changing the operative statutory language from "domicile" to "residence," Congress eliminated the intent-based requirement on which imputation had been predicated under Section 212(c).

The asserted general legislative preference for family unity likewise cannot trump the statute's clear eligibility requirements; rather, the alien's family ties are to be considered in determining whether he should be granted relief as a matter of discretion if he is otherwise eligible. The long waiting period for minor children of LPRs to obtain derivative LPR status under certain circumstances demonstrates that family unity is by no means an unyielding goal of the INA. The Ninth Circuit's reliance on any such general policy preference is particularly inapt here, where respondents (like many other aliens seeking imputation for purposes of cancellation of removal) are not minors but adults who have committed removable offenses.

C. To the extent any ambiguity remains, the Board's precedential interpretations of Sections 1229b(a)(1) and (2) as not permitting imputation are reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The other courts of appeals that have considered the question have correctly rejected the Ninth Circuit's contrary interpretation and granted deference to the Board. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin* v. *Attorney Gen. of the*

U.S., 520 F.3d 264, 269 (3d Cir. 2008); see also *Cervantes* v. *Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).

The Ninth Circuit's reasoning in extending imputation from former Section 212(c) to Section 1229b(a) is erroneous in multiple respects. The Ninth Circuit has ignored the fundamental distinction between "domicile" and "residence"—including the absence of "intent" as a consideration for purposes of determining residence—and thereby has failed to acknowledge that "there is no legal reason for [the Court] to turn to [a child's] parents" under Section 1229b(a)(2). *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1031-1032 (9th Cir. 2005) (Fernandez, J., dissenting). The Ninth Circuit has made the further leap of imputing to a child not only a parent's period of residence after lawful admission but also the parent's status as an LPR—despite the absence of any textual hook whatsoever in Section 1229b(a)(1). Although the Ninth Circuit concluded that the Board's interpretation is not entitled to *Chevron* deference because the Board has been inconsistent, it cited only instances in which the Board has permitted imputation in other contexts under different statutory provisions that implicate an alien's state of mind but not "status" or "residence." See *id.* at 1024-1026. The Board has been consistent in its rejection of imputation of objective legal status and has distinguished those other contexts in its reasoned rejection of the Ninth Circuit's contrary rule under Section 1229b(a). See *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600-601 (2008); *In re Escobar*, 24 I. & N. Dec. 231, 234 n.4 (2007).

ARGUMENT

SECTION 1229b(a) DOES NOT PERMIT IMPUTATION OF A PARENT'S YEARS OF PERMANENT RESIDENT STATUS, OR RESIDENCE AFTER LAWFUL ADMISSION, TO ESTABLISH AN ALIEN'S OWN ELIGIBILITY FOR CANCELLATION OF REMOVAL

Section 1229b(a) requires (in relevant part) that "the alien" seeking cancellation of removal "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. 1229b(a). Based on an interpretation rejected by the Board of Immigration Appeals and by the other courts of appeals that have considered it, the Ninth Circuit permitted respondents to circumvent those requirements by pointing to the years of LPR status and residence after lawful admission in any status accrued by someone else—their parents. Such imputation conflicts with the statute's plain terms, structure, and legislative history—as well as with the Board's correct and reasonable interpretation of Section 1229b(a), which is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Accordingly, the Ninth Circuit's atextual and outlying imputation rule cannot stand.

A. The Plain Text Of Section 1229b(a) Requires That The Alien Personally Satisfy Its Eligibility Requirements

Statutory interpretation "must begin with the plain language of the statute." *Negusie* v. *Holder*, 129 S. Ct. 1159, 1178 (2009). Here, the plain language of 8 U.S.C. 1229b(a) dictates that the decisionmaker look to the status, residency, and admission date of "the alien" himself, not of anyone else, for purposes of establishing eligibil-

ity for cancellation of removal. The Ninth Circuit decisions allowing an alien to rely on a parent's status, residency, and admission date to satisfy the requirements of Sections 1229b(a)(1) and (2) cannot be reconciled with the statutory text.

1. Section 1229b(a)(2) requires that "the alien" have resided in the United States for seven continuous years after "having been admitted" in any status

Section 1229b(a)(2) requires as an element of eligibility for cancellation of an alien's removal that "the alien * * * has resided in the United States continuously for 7 years after having been admitted in any status." That text forecloses the Ninth Circuit's imputation rule.

First, by specifying that "*the* alien" whose removal is at issue must have resided in the United States for seven years after having been admitted, the statute leaves no room to impute to the alien the admission date or residency period of anyone else (including the alien's parent). The use of the definite article before "alien" limits the phrase to "the alien" defined earlier in the sentence—that is, the alien for whom cancellation of removal is being considered. "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (citation omitted); see *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923) ("The use of the definite article [before appraisement] means an appraisement specifically provided for."); see also *American Heritage Dictionary of the English Language* 1792 (4th ed. 2006) (defining "the" as "[u]sed before singular or plural nouns and

noun phrases that denote particular, specified persons or things"). The Ninth Circuit's decisions permitting the alien seeking cancellation relief to rely on the admission and residence of someone else disregard this basic textual point.

Second, and relatedly, the phrase "after having been admitted" reinforces the conclusion that Section 1229b(a)(2) refers to the alien's own admission rather than the admission of any other individual. That reading is supported by the INA's definition of the terms "admission" and "admitted," which is, "with respect to an alien, the lawful entry of *the* alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (emphasis added); see p. 4, *supra*. In other words, an alien's status as "admitted" is to be determined solely by reference to the alien's *own* lawful entry after official inspection and authorization. The admission of anyone else, including the alien's parent, is irrelevant. The Ninth Circuit's departure from that requirement is especially stark, given that Gutierrez did not attain any lawful status at all (let alone admission) until he was granted LPR status at the age of 19—just two years before committing a removable offense and being placed into removal proceedings. To nevertheless permit imputation in such circumstances would effectively redact the words "of the alien" from the definition of "admission" in 8 U.S.C. 1101(a)(13)(A). Cf. *In re Reza-Murillo*, 25 I. & N. Dec. 296, 299 (B.I.A. 2010).

Third, the INA provides that "[t]he term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). That definition's use of the possessive pro-

noun "his" evinces that the term "residence"—and hence the term "resided" in Section 1229b(a)(2)—denotes the alien's own residence, and not the residence of anyone else. Moreover, the definition's reference to the "principal, actual dwelling place in fact, without regard to intent," expressly precludes any reliance on intent—which, by contrast, is relevant to determining an alien's domicile (see pp. 28-29, 36-37, *infra*). For that reason, regardless of whether a minor alien is capable of forming a legally sufficient intent to establish *domicile*, there is no basis to consider intent (and thus to impute a parent's intent) with respect to the minor's actual *residence*. Accordingly, the use of the term "resided" in Section 1229b(a)(2) confirms the conclusion that only the actions, status, and physical location of the alien himself have relevance in establishing statutory eligibility for cancellation of removal.

2. Section 1229b(a)(1) requires that "the alien" seeking cancellation of removal have been "lawfully admitted for permanent residence" for five years

Section 1229b(a)(1), the other eligibility requirement at issue in this case, requires that "the alien * * * has been an alien lawfully admitted for permanent residence for not less than 5 years." By referring to the lawful permanent residence of "*the* alien" subject to removal, Section 1229b(a)(1), like Section 1229b(a)(2), makes clear that the alien seeking cancellation must *personally* satisfy the specified requirement. See pp. 16-17, *supra*.

Moreover, the phrase "lawfully admitted for permanent residence" is defined by the INA to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such

status not having changed." 8 U.S.C. 1101(a)(20). "[S]tatus," in turn, is an attribute personal to the individual alien. See *In re Blancas-Lara*, 23 I. & N. Dec. 458, 460 (B.I.A. 2002) ("[S]tatus" "is generally defined in the legal context as a '[s]tanding; state or condition,' and as '[t]he legal relation of [an] individual to [the] rest of the community'"; it "denotes someone who possesses a certain legal standing.") (quoting *Black's Law Dictionary* 1264 (5th ed. 1979)). Section 1229b(a)(1)'s reference to "lawfully admitted for permanent residence" thus reinforces the conclusion that eligibility for cancellation turns on whether and when the government has affirmatively accorded the alien himself the privilege of residing permanently in the United States as an immigrant. The actions and status of others, including the alien's parents, are irrelevant for those purposes.

By contrast, there is no plausible reading of Section 1229b(a)(1)'s text that supports the Ninth Circuit's conclusion that the requirement that "the alien" have been lawfully admitted for permanent residence for five years can be satisfied by the fact that the alien's *parent* had been lawfully admitted for permanent residence for five years. Indeed, under the Ninth Circuit's reading, even an alien who has never been granted LPR status at all might be eligible for cancellation of removal based on a parent's LPR status—contradicting the very title of 8 U.S.C. 1229b(a) ("Cancellation of removal for certain permanent residents"). Cf. *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1110 n.9 (2009)(reserving question). The fact that that is a possible outcome under the Ninth Circuit's interpretation of Section 1229b(a) demonstrates its disconnect with the statute's text.

3. Section 1229b(a)'s lack of an explicit bar to imputation does not suggest that imputation is permissible

As explained above, the plain terms of Sections 1229b(a)(1) and (2) leave no room for imputing somebody else's status, residence, or admission date to establish an alien's eligibility for cancellation relief. See *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1032 (9th Cir. 2005) (Fernandez, J., dissenting) (finding that Section 1229b(a) clearly forecloses imputation). It is therefore not surprising that Section 1229b(a) does not expressly prohibit imputation. Contrary to the Ninth Circuit's conclusion (*id.* at 1022; see also *Sawyers* Br. in Opp. 12-13), the lack of an express bar cannot be read as affirmatively authorizing imputation.

Section 1229(a) is not rendered "silent" simply because it does not explicitly address imputation. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see also, *e.g.*, *Pruidze* v. *Holder*, 632 F.3d 234, 240 (6th Cir. 2011) (explaining that statutory silence does not always indicate a "gap to fill"); *Lin-Zheng* v. *Attorney Gen. of the U.S.*, 557 F.3d 147, 156 (3d Cir. 2009) (en banc) ("[A] statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.") (citation omitted; brackets in original). If a statute were required to refute every possible alternative, nearly every statute would be silent or ambiguous as to far-fetched alternatives. Cf. *Cuomo* v. *Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009); see *Prestol Espinal* v. *Attorney Gen. of the U.S.*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting approach that "manufactures an ambiguity from Congress' failure to specifically foreclose each exception

that could possibly be conjured or imagined," because that "would create an 'ambiguity' in almost all statutes"). Indeed, in denying the availability of imputation under another immigration provision providing similar cancellation-of-removal relief, the Ninth Circuit itself has recognized that "while the text of [the statute] does not explicitly prohibit imputation, neither is it ambiguous." *Barrios* v. *Holder*, 581 F.3d 849, 865 (2009).[4]

4. The structure of the statutory scheme is inconsistent with imputation

The structure of the statutory scheme at issue reinforces the conclusion that Congress left no room for imputation. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (citations omitted). That Congress specified separate sub-

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[4] In analogous circumstances, aliens seeking temporary protected status under the INA have contended that their parents' residency could satisfy 8 U.S.C. 1254a(c)(1)(A)(ii)'s continuous-residence requirement. See *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010). Although they argued that the statute is ambiguous because it "does not explicitly permit or disallow [imputation]," the Third Circuit rejected that argument and held that Section 1254a(c)(1)(A)(ii) is not "'ambiguous' merely because it does not expressly forbid every possible mechanism for functional—but not actual—satisfaction of statutory requirements. Else, near every statute would be 'ambiguous' and courts would have unfettered freedom to fashion creative mechanisms for satisfying the otherwise clear requirements mandated by Congress." *Ibid.*; see *Cervantes* v. *Holder*, 597 F.3d 229, 238 (4th Cir. 2010) (Traxler, C.J., concurring) (finding "no ambiguity to be explained or gap to be filled in [Section] 1254a(c)(1)(A)(ii)" with respect to the impermissibility of imputation).

sections within Section 1229b(a) with distinct requirements reflects Congress's insistence that the alien seeking cancellation of removal meet precise standards, and not be allowed to qualify through a form of substantial compliance or by resort to equitable theories. Notably, Congress has demonstrated elsewhere in the INA that it knows how to automatically accord an immigration status or benefit to an alien child when the parent is accorded a certain status or benefit. See, *e.g.*, 8 U.S.C. 1158(b)(3)(A) (2006 & Supp. III 2009) (granting same status as parent to certain children of aliens granted asylum); 8 U.S.C. 1431 (automatic acquisition of United States citizenship for minor child upon naturalization of parent in certain circumstances); see also *Gutierrez* Br. in Opp. 20-21. But it has not done so here.

Applying Section 1229b(a) according to its plain terms also best harmonizes with other relevant sections of the INA. For example, 8 U.S.C. 1229b(d)(1) provides that an alien's period of continuous residence after admission stops accruing for purposes of cancellation relief when that alien has committed a crime that renders him inadmissible. Imputing a parent's earlier admission and residence, as the Ninth Circuit has done, could allow an alien to circumvent that limitation and thereby nullify the operation of Section 1229b(d)(1) in certain cases—a result that Congress would not have intended. Additionally, 8 U.S.C. 1227(a)(2)(A)(i)(I) renders deportable an alien convicted of a crime involving moral turpitude committed within five years of admission. Under the Ninth Circuit's imputation rules, however, such an alien might be able to impute a parent's prior admission date to become eligible for cancellation of removal under Section 1229b(a). In that scenario, the same alien could be considered to have two different dates for which he was

lawfully admitted for permanent residence in the same removal proceeding—his own LPR admission date, which determines his removability, and another person's imputed LPR admission date, which would determine his eligibility for cancellation relief. Congress presumably would not have intended that result either.[5]

B. The Legislative History And Statutory Context Do Not Reveal Any Congressional Intent To Permit Imputation Under Section 1229b(a)

Because Section 1229b(a)'s language leaves no room for the Ninth Circuit's imputation rule, its reliance on the legislative history and legal context underlying the enactment of Section 1229b(a) (*Cuevas-Gaspar*, 430 F.3d at 1026-1029; see also *Gutierrez* Br. in. Opp. 13-17; *Sawyers* Br. in Opp. 14-16) is misplaced. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011) ("In interpreting a statute, [the Court's] inquiry must cease if the statutory language is unambiguous.") (citations and internal quotation marks omitted). Not surprisingly, there is no indication that Congress intended—contrary to Section 1229b(a)'s plain text—to allow an alien to impute another person's status, residency, or admission date to satisfy the eligibility requirements for cancellation relief.

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[5] Although having more than one admission date is not itself impossible or inconsistent with the INA, see *In re Alyazji*, 25 I. & N. Dec. 397, 400 (B.I.A. 2011) ("some aliens are admitted to the United States more than once during their lives"), it would be incongruous to use different admission dates in the manner suggested above—especially where the earlier admission date is imputed from somebody else and results in different admission dates for the same immigration status (*e.g.*, LPR).

1. The legislative history furnishes no support for imputation under Section 1229b(a)

Section 1229b(a) was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597, to replace the waiver of exclusion (and deportation) previously available under former Section 212(c). See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (Section 1229b(a) "is intended to replace and modify the form of relief now granted under section 212(c) of the INA."); H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. I, at 232 (1996) (same); see also *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001) (explaining that IIRIRA repealed Section 212(c) and replaced it with 8 U.S.C. 1229b(a)).

The limited legislative history that exists, viewed against the backdrop of the existing legal landscape, indicates that Congress focused on three main goals in circumscribing eligibility for the newly created cancellation-of-removal relief: (1) restricting relief from removal for aliens convicted of certain crimes;[6] (2) creating a "stop-time" rule that would stop the running of an alien's period of residence at a defined point;[7] and (3)

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[6] As the Court explained in *St. Cyr*, Section 1229b "gives the Attorney General the authority to cancel removal for a narrow class of * * * aliens[.] So narrowed, that class does not include anyone previously 'convicted of any aggravated felony.'" 533 U.S. at 297 (quoting 8 U.S.C. 1229b(a)(3) (1994 & Supp. V 1999)).

[7] The stop-time rule was motivated by the concern that aliens had been delaying their immigration proceedings in order to continue to accrue time towards eligibility. See H.R. Rep. No. 879, 104th Cong., 2d Sess. 108 (1997) ("The reforms ended the accrual of time-in-residence on the date an alien is placed into removal proceedings, thus removing the incentive for aliens to prolong their cases in the hope of

clarifying the operation of the durational requirements for legal status and physical presence that had existed under Section 212(c). As explained below, the third issue culminated in the requirements at issue in this case.

In pertinent part, Congress enacted Section 1229b(a) to revise the physical presence and status requirements for relief from removal—with no suggestion that an alien could rely on imputation to satisfy them. See *Mercado-Zazueta*, 580 F.3d at 1110 (stating that the statute was crafted "to resolve a circuit split that did not concern imputation"). As noted above (note 2, *supra*), a waiver under former Section 212(c) was available to LPR aliens who could show seven consecutive years of "lawful unrelinquished domicile" in the United States. The courts of appeals had disagreed as to whether those seven years must follow the granting of LPR status to the alien or whether the alien could count years of domicile in the United States under some other lawful status preceding his adjustment to LPR status. See *Cuevas-Gaspar*, 430 F.3d at 1027-1028 (collecting cases).

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remaining in the U.S. long enough to be eligible for relief.") (describing H.R. 1915, one of IIRIRA's predecessors); see also *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS) ("Currently, that 7 years is permitted to run for as long as they're here. We will be proposing legislation that will stop the running of the clock at the beginning of the immigration proceeding when the order to show cause is issued. We think that will then stop needless delay, people filing additional motions to accumulate the 7 years."). The stop-time rule enacted in Section 1229b(d)(1) ensured that the eligibility period ended, at the very latest, at the time immigration proceedings were initiated. As explained above (p. 22, *supra*), however, the Ninth Circuit's imputation rule could undermine its operation in certain circumstances.

In response, Section 1229b(a) created two new and distinct durational requirements. Congress made clear that the first—the five-year LPR status requirement—must be satisfied by years after the alien obtains LPR status, while the second—the seven-year continuous-residence (replacing "unrelinquished domicile") requirement—could be satisfied by years residing in the United States before the alien obtained LPR status (as long as those years were subsequent to the alien's admission under some lawful status). See 8 U.S.C. 1229b(a)(1) and (2). Congress designed those dual requirements, along with the stop-time rule, to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082, S6104 (daily ed. May 3, 1995) (Department of Justice explanation of S. 754, Immigration Enforcement Improvements Act of 1995, a precursor to IIRIRA); see also *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS) (same).

At no point in Congress's consideration of Section 1229b was there any indication that it considered the possibility, let alone intended, that the period of LPR status or residence after lawful admission of anyone other than the alien seeking cancellation of removal—such as the alien's parent—would satisfy the new statutory requirements. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009) (finding an "absence of support in the statutory language or legislative history" for the proposition that a parent's residence "was intended to be counted towards the requirements of section 1229b(a)");

Augustin v. *Attorney Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008) ("[W]e have been unable to find in IIRIRA's legislative history any indication of Congress's intention regarding imputation."). Nor is there any evidence that Congress approved or intended to adopt the preexisting interpretation permitting imputation with respect to the "domicile" requirement under former Section 212(c). To the contrary, it appears that Congress feared that the carefully prescribed limits on Section 1229b(a) relief would not be respected. See *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 2d Sess. 3 (1996) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Immigration & Claims) ("[T]here is legitimate concern that even a narrowly tailored form of relief would soon be broadened to include a wide range of cases never intended by Congress.").

There is no merit to respondents' argument that it was "settled" (*Sawyers* Br. in Opp. 16) that the previous domicile-based eligibility requirement in former Section 212(c) permitted imputation, and that Congress therefore automatically "authorized the imputation rule" (*id.* at 17; see *Gutierrez* Br. in Opp. 15) when enacting Section 1229b without any mention of imputation. As an initial matter, there is no indication that the imputation issue was ever called to the attention of Congress. See *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) ("[C]ongressional silence lacks persuasive significance.") (internal quotation marks and citation omitted); see also *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

More importantly, the doctrine of congressional ratification does not apply where, as here, "Congress did not simply reenact [the statute] without change." *Jama*

v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005). In this instance, Congress enacted a new statute, with meaningfully different operative language. In particular, Congress replaced the "domicile" requirement in Section 212(c) with a "reside[nce]" requirement in Section 1229b(a)(2). The latter differs fundamentally from the former: domicile turns on intent, whereas residence does not. Compare *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) (adopting common-law definition of "domicile" that "aliens must not only be physically present here, but must intend to remain") (citation omitted), with 8 U.S.C. 1101(a)(33) (defining "residence" to be "without regard to intent");[8] see also pp. 36-37, *infra*. And, with respect to Section 1229b(a)(1)'s separate five-year LPR status requirement, there is neither a domicile nor a residence requirement—leaving no textual hook whatsoever for imputation.

As Gutierrez acknowledges, the prior authority permitting imputation under Section 212(c) reasoned that "because most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Gutierrez* Br. in Opp. 13-14 (internal quotation marks and citations omitted). There is no similar intent-based requirement in Section 1229b(a) to support the use of imputation for cancellation of removal. See *In re Escobar*, 24 I. & N. Dec. 231, 233 (B.I.A. 2007) ("[R]esidence is different from domicile because it 'contains no element of subjective intent.' Accordingly, we conclude that there is no logical or legal basis to consider the residence of a minor alien's parents in determining whether the minor ac-

[8] The definition of "residence" in 8 U.S.C. 1101(a)(33) long predated IIRIRA, see Immigration and Nationality Act, ch. 477, § 101(a)(33), 66 Stat. 170, whereas "domicile" was never defined in the Act.

quired the necessary years of residence" under Section 1229b(a).) (quoting *Cuevas-Gaspar*, 430 F.3d at 1031 (Fernandez, J., dissenting)); see also *Augustin*, 520 F.3d at 270-271 (similar); *Deus*, 591 F.3d at 810-811 (similar). Whether "Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation" (*Sawyers* Br. in Opp. 17 (citation omitted)) or for some other purpose (*Gutierrez* Br. in Opp. 14-15) is beside the point; the pertinent fact is that there is no longer any intent-based requirement on which imputation (or ratification thereof) could be predicated.

2. The general preference for family unity does not trump the statute's text

Lacking any direct evidence of congressional intent, the Ninth Circuit premised its imputation rule on what it perceived to be the "high priority" accorded by the immigration laws to keeping LPR parents and their minor children together. *Cuevas-Gaspar*, 430 F.3d at 1024 (quoting *Lepe-Guitron*, 16 F.3d at 1025); see *Mercado-Zazueta*, 580 F.3d at 1105-1106; see also *Gutierrez* Br. in Opp. 20-22; *Sawyers* Br. in Opp. 21-22. But there is no reason to believe that Congress intended that general policy to trump Section 1229b(a)'s explicit requirement that the alien himself meet certain minimum criteria to qualify for cancellation of removal. Rather, the existence of family ties in the United States is a positive factor to be considered in determining whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discretion. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

In any event, in cases in which aliens would rely upon their parents' status or residence to satisfy the eligibility criteria of Sections 1229b(a)(1) and (2), the aliens

applying for relief typically are *not* unemancipated minors seeking to reunite or remain with their parents in the United States. Instead, they are adults seeking to avoid removal after committing removable offenses. Respondent Gutierrez, for example, was not granted LPR status in his own right until October 2003, at the age of 19, and he did not seek to benefit from imputation of his father's LPR status and residence until after he was apprehended and placed in removal proceedings for alien smuggling in December 2005, at the age of 22. *Gutierrez* Pet. App. 12a-13a. Respondent Sawyers also did not seek to benefit from imputation until after he was placed in removal proceedings for his drug convictions, when he was 26 years old. *Sawyers* Pet. App. 10a-11a; *Sawyers* J.A. 56-57.

Moreover, any immigration-law preference for family unity is not absolute. Although many immigration programs permit an alien's spouse and minor children to apply for admission at the same time the principal alien obtains admission as an LPR, not all do. The legalization program under the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, for example, does not provide for derivative legal status for immediate family members. See 8 U.S.C. 1255a (2006 & Supp. III 2009) (providing for adjustment of status for only those aliens individually meeting the requirements); *Family Unification, Employer Sanctions & Anti-Discrimination Under IRCA: Hearing Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 100th Cong., 2d Sess. 34 (1988) ("Congress didn't order derivative legalization" under IRCA) (statement of Rep. Romano L. Mazzoli); *id.* at 147-148 ("Congress clearly said no derivative legalization—we had an opportunity to say it, and

we intentionally did not make every member of the family automatically part of the one successful application."); *Applicant Processing for Family Unity Benefits*, 56 Fed. Reg. 42,948 (Aug. 30, 1991) (Under IRCA, "no provisions [were] made for any derivative immigration status for their spouses or children.").

Aliens who obtain LPR status through IRCA, and others who for whatever reason did not or could not apply for their immediate family members along with their own application, may independently seek a visa for their immediate family members under 8 U.S.C. 1151-1153 (2006 & Supp. III 2009). The number of visas allocated to spouses and minor children of LPRs is subject to annual numerical limits set by Congress (8 U.S.C. 1153(a)(2)), however, and because demand for those visas has exceeded the available number, a large backlog has existed for visas in that category for decades. Accordingly, many immediate family members of LPRs must wait years to immigrate to the United States.[9] For example, when Gutierrez was granted LPR status in October 2003, children of LPRs emigrating from Mexico had been waiting over seven years (11 years if over the age of 21) for a visa. See U.S. Dep't of State, *Visa Bulle-*

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[9] Some immediate relatives of IRCA beneficiaries were granted a limited form of relief from removal under the Family Unity Program. See Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 5029, located as amended at 8 U.S.C. 1255a note 3. But that relief was available only to immediate relatives who entered the United States prior to certain specified dates in 1988. *Ibid.*; see *In re Reza-Murillo*, 25 I. & N. Dec. at 297 n.1 (describing program); see also 8 U.S.C. 1101(a)(15)(V).

tin for October 2003, http://www.travel.state.gov/visa/bulletin/bulletin_2985.html.[10]

Although well aware of this backlog and the long waiting times that result, Congress for the most part has not acted to eliminate them.[11] Congress's failure to respond indicates that the "preference" for family members of LPRs is just that—a preference—and not an absolute mandate that trumps all other immigration policy goals or statutory requirements. Congress thus has not categorically placed a preference for unifying minor (let alone adult) children with their LPR parents in the United States above all other requirements of the immigration laws. The Ninth Circuit's rule that aliens may rely on their parents' LPR status and residence to obtain cancellation relief under Section 1229b(a) essentially allows aliens an end-run around specific statutory limitations on obtaining lawful status; indeed, the Ninth Circuit's rule would impute a parent's adjustment to LPR status even if the alien had not or could not have

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[10] For that reason, the delay alien children experience in obtaining LPR status may be attributable in certain cases to the waiting time for immigrant visas and not to any decision on the part of the alien's parents. Contrary to Sawyers's suggestion (*Sawyers* Br. in Opp. 20-21), however, the Ninth Circuit's imputation rule does not require a court to examine the reasons why an alien did not obtain LPR status when his parent obtained that status. Nor does the statute provide any basis for such an inquiry. Cf. *Mercado-Zazueta*, 580 F.3d at 1115-1116 (Graber, J., concurring).

[11] The visa backlog was the subject of much discussion in Congress prior to the passage of IIRIRA. See H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. I, at 134 (1996) ("[T]here is a backlog of 1.1 million spouses and minor children of lawful permanent residents waiting for admission or for legal status."). Congress, however, rejected proposals to eliminate or reduce the backlog. See *id.* at 84; H.R. Rep. No. 879, 104th Cong., 2d Sess. 121 (1997).

satisfied the procedural and substantive eligibility requirements for LPR status at that earlier time. See *Escobar*, 24 I. & N. Dec. at 234 (reasoning that imputation under Section 1229b(a)(1) disregards "the mandated statutory and regulatory application process and the substantive eligibility requirements for admission"). Relatedly, such imputation bypasses limitations placed on the availability of cancellation-of-removal relief in Section 1229b(a), and thereby upsets Congress's carefully crafted balance among competing policy concerns.

C. The Board's Reasonable Interpretation Of Section 1229b(a) Is Entitled To *Chevron* Deference

Given that the plain meaning of Section 1229b(a) forecloses imputation of another alien's status, period of residency, or date of admission, the questions presented can be resolved at step one of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843 (calling for further inquiry only if "the statute is silent or ambiguous with respect to the specific issue"). But even if the statute were deemed ambiguous, the Board's precedential interpretation that imputation is impermissible—see *Escobar*, 24 I. & N. Dec. at 233-235 (Section 1229b(a)(1)); *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008) (Section 1229b(a)(2))—is at least reasonable and thus entitled to controlling deference at step two of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843-844; see also *Negusie*, 129 S. Ct. at 1163-1164 (according *Chevron* deference to Board's interpretation of INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same).

1. The standard for what constitutes an agency's reasonable interpretation for *Chevron* purposes is broad, 467 U.S. at 843, and courts ordinarily defer to the Board's interpretation of the INA unless the interpreta-

tion is "clearly contrary to the plain and sensible meaning of the statute." *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted); see *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 712 (2011) ("The sole question for the Court at step two under the *Chevron* analysis is 'whether the agency's answer is based on a permissible construction of the statute.'") (quoting *Chevron*, 467 U.S. at 843). As other courts of appeals have concluded with respect to Section 1229b(a)(2), the Board's "straightforward" refusal here "to read into the statute an [imputation] exception seemingly at odds with the statute's requirements" is at the very least reasonable. *Augustin*, 520 F.3d at 270-271 (holding that the Board's "refusal to create an exception simply heeds the statute's plain requirements"); see *Deus*, 591 F.3d at 811 (deeming "the [Board]'s interpretation * * * not inconsistent with the statute and therefore permissible under *Chevron*'s deferential review"); see also *Cuevas-Gaspar*, 430 F.3d at 1032 (Fernandez, J., dissenting). That should be the end of the inquiry under *Chevron*.

The Ninth Circuit has not held that the Board's interpretation rejecting imputation is foreclosed by the terms of the statute; nevertheless, it has determined that the Board's interpretation is unreasonable. See *Mercado-Zazueta*, 580 F.3d at 1112-1115; *Cuevas-Gaspar*, 430 F.3d at 1024-1029. But Section 1229b(a)'s text and legislative history provide more than ample support for the Board's interpretation. As discussed above (pp. 15-20, 23-29, *supra*), the plain language of Section 1229b(a) dictates that the decisionmaker look only to the status, residency, and admission of "the alien" who is seeking cancellation of removal for purposes of establishing the alien's eligibility for that relief,

and the legislative history lacks any basis for a contrary reading.

2. By contrast, the Ninth Circuit's reasoning—based on its precedent that originated in the different wording of former Section 212(c), and on its policy determinations—fails on its own terms. The Ninth Circuit's imputation rule traces back to *Lepe-Guitron*, *supra*, in which it held that a parent's domicile could be imputed to an unemancipated minor child for purposes of the "domicile" requirement under former Section 212(c). In that case, the Ninth Circuit relied on the fact that the common-law definition of "domicile" incorporates notions of intent, *i.e.*, not only physical presence but an intent to remain indefinitely in the United States. *Lepe-Guitron*, 16 F.3d at 1025. The Ninth Circuit reasoned that because "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place," "a child's domicile follows that of his or her parents." *Ibid.* (citations omitted); see Restatement (Second) of Conflict of Laws § 22(1), at 88 (1971) (providing that generally "[a] minor has the same domicil as the parent with whom he lives").

In *Cuevas-Gaspar*, the Ninth Circuit extended the reasoning of *Lepe-Guitron* to Section 1229b(a)(2) by effectively equating "domicile" with "residence"—the specified metric for Section 1229b(a)(2)'s seven-year requirement. 430 F.3d at 1026. Over a dissent, the panel majority in *Cuevas-Gaspar* rejected the distinction between residence and domicile, stating summarily that the distinction "is not * * * so great as to be dispositive." *Ibid.* The *Cuevas-Gaspar* majority then took a further leap by reasoning that because *Lepe-Guitron* held "that a parent's 'lawful unrelinquished domicile' is imputed to the parent's minor children," it must have

"necessarily held that the parent's *admission* for permanent residence was also imputed to the parent's minor children." *Ibid.* On that basis, it proceeded broadly to permit the alien child to rely on a parent's "admission" for purposes of satisfying the requirement of Section 1229b(a)(2). *Ibid.*

The Ninth Circuit's extension of *Lepe-Guitron* in *Cuevas-Gaspar* is erroneous in at least two critical respects. First, it ignores the distinction between "domicile" and "residence." The INA expressly provides that "residence" is to be evaluated "without regard to intent," 8 U.S.C. 1101(a)(33)—a key consideration in determining domicile. See pp. 28-29, *supra*. Courts consistently have recognized that the element of intent distinguishes the two concepts in the immigration context. See, *e.g.*, *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010) (distinguishing "residence from domicile, because under the INA, residence is defined as an alien's 'principal, actual dwelling place in fact, *without regard to intent*'") (quoting 8 U.S.C. 1101(a)(33); citing *Augustin*, 520 F.3d at 270-272); *Cervantes* v. *Holder*, 597 F.3d 229, 237 (4th Cir. 2010) ("[T]here is a crucial distinction between a 'domicile' and a 'residence.'"); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (noting that although "[a] minor's domicile is the same as that of its parents," residence is "determined from the physical fact of * * * living in a particular place"); *Chan Wing Cheung* v. *Hamilton*, 298 F.2d 459, 461 (1st Cir. 1962) ("'Residence' within the [INA] is not the equivalent of domicile.").[12]

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[12] Even the Ninth Circuit elsewhere has recognized and given effect to the intent-based distinction between "domicile" and "residence" under the immigration laws. *Kyung Park* v. *Holder*, 572 F.3d 619, 623-624 (2009) (comparing 8 C.F.R. 213a.1 with 8 U.S.C. 1101(a)(33)); see

The Ninth Circuit failed to provide any sound basis to transpose the common-law understanding of "domicile," which incorporates intent, onto the statutorily defined term "residence." Crucially, once "intent" is removed from the analysis, "there is no legal reason for [the Court] to turn to [a child's] parents." *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting); see *Cervantes*, 597 F.3d at 237 (stating that children "can have their own residences, separate and apart from that of their parents"); *Deus*, 591 F.3d at 811 (holding that "the relevant inquiry under [Section] 1229b(a), residence, presents no question regarding a minor's intention").

Second, the Ninth Circuit in *Lepe-Guitron* discussed the imputation of "domicile" alone and confined its holding to the limited principle "that a child's domicile follows that of his or her parents." 16 F.3d at 1025. *Lepe-Guitron* did not hold that a parent's lawful admission may be imputed to the child; indeed, there was no occasion to do so in that case. The court in *Lepe-Guitron* emphasized that the alien child himself had entered the United States legally with his parents and "was always legally within the country [and] was domiciled here." *Id.* at 1024. The alien child also had become an LPR as a minor, albeit only for three years before he was convicted and invoked Section 212(c) relief. *Id.* at 1022-1023. Because the court in *Lepe-Guitron* rejected an interpretation that would require a minor child's (as opposed to an adult's) "'lawful unrelinquished domicile' to begin on the day he or she acquires permanent residence," there was no need to impute the parent's LPR

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8 C.F.R. 213a.1 ("*Domicile* means the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of the Act, with the intention to maintain that residence for the foreseeable future.").

status to the alien child. *Id.* at 1025; see *id.* at 1026 n.12 (stating that only adults must be lawful permanent residents to accrue domicile status). The Ninth Circuit's reliance in *Cuevas-Gaspar* on *Lepe-Guitron* as supporting imputation of lawful admission (in addition to residency) thus has no basis in *Lepe-Guitron*. And *Mercado-Zazueta*'s extension of *Cuevas-Gaspar* as requiring imputation of a parent's LPR status to the alien seeking relief under Section 1229b(a)(1) (580 F.3d at 1113) is doubly mistaken for that reason.

3. Although the Ninth Circuit identified "other contexts" in which the Board has permitted imputation, those contexts are easily distinguishable and thus create no "inconsistency" diminishing the deference owed to the Board's interpretation of Section 1229b(a). *Mercado-Zazueta*, 580 F.3d at 1111-1112; see *Cuevas-Gaspar*, 430 F.3d at 1024-1026. Most fundamentally, those different contexts—involving issues of abandonment, firm resettlement, and knowledge of admissibility, see *ibid.*—implicate state of mind, not objective conditions such as "status" or "residence."

It is true, for example, that the Board has imputed to an alien child (to the child's detriment) a parent's abandonment of LPR status; but abandonment clearly incorporates consideration of the alien's intent. See, *e.g.*, *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988) (stating that "the immigration judge was incorrect in concluding that the applicant's intent was irrelevant in determining whether she [as well as her children] had abandoned that status"); see also *Augustin*, 520 F.3d at 271 (finding that such cases "are not in direct conflict with the BIA's interpretation of the cancellation statute because the determination in these cases turned in part on the minor alien's intention"); *Escobar*, 24 I. & N. Dec. at 234 n.4

("The imputation of a decision to abandon permanent resident status from a parent to a child is consistent with the above-mentioned longstanding policy that a child cannot form the intent necessary to establish his or her own domicile."). The other situations are similarly distinguishable. See, *e.g.*, *Vang* v. *INS*, 146 F.3d 1114, 1116-1117 (9th Cir. 1998) (likening firm resettlement in a third country to domicile for purposes of the bar to asylum); *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (attributing parents' knowledge of misrepresentation in entering the United States to the children).

By contrast, the criteria at issue here—"residence," "admission," and LPR "status"—depend solely on objective conduct by the alien personally or some official action by the government, with respect to the alien, without regard to mental state. The Board has been consistent in its rejection of imputation of objective legal status under Section 1229b(a) and has explained its reasoned (and wholly reasonable) rejection of the Ninth Circuit's contrary rule—largely for the reasons set forth in this brief. See *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601; *Escobar*, 24 I. & N. Dec. at 233-235. Accordingly, to the extent the Court finds any ambiguity in the statutory language, the Board's interpretation is entitled to deference.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

* * * * *

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United

States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

* * * * *